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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1942

Nos. 635

MOORE-McCORMACK LINES, INC.,
Petitioner,

against

EDWARD FOSTER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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UGENE J. DAVIDSON,
Of Counsel.

Dated, December 31, 1942.

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Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Moore-McCormack Lines, Inc., the petitioner herein, prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit to review a decision of that Court rendered on December 7, 1942 (R. p. 282), affirming a judgment of the United States District Court for the Southern District of New York in favor of the respondent, Edward Foster, and against the petitioner, Moore-McCormack Lines, Inc.

Opinion Below

The opinion of the Circuit Court of Appeals, not yet reported, is set forth at page 282 of the Record.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented

1. Whether the Suits in Admiralty Act, 46 U. S. C. §§ 741, 742 provides the exclusive remedy to recover for injuries arising out of the operation of a merchant vessel owned by the United States and leased for operation by it to a private corporation.

2. Whether the fact that the United States would not be responsible for any damages which may be recovered for injuries arising out of the operation of a merchant ship owned by it and leased by it for operation to a private corporation, precludes the Suits in Admiralty Act, 46 U. S. C. §§ 741, 742 from providing the exclusive remedy for such injuries so sustained.

3. Whether the purpose of the Suits in Admiralty Act, 46 U. S. C. §§ 741, 742 was to relieve the United States of the inconvenience resulting from seizures of government owned vessels when operated under a plan chosen by it rather than operated by one of the government agencies or government corporations partially or wholly owned by the United States.

4. Whether the operator of a merchant vessel is *ipso facto* guilty of negligence upon the failure of a light to continue to shine, where there is no evidence showing why the light went out or that the defendant had knowledge (either actual or constructive) that the light no longer continued to shine.

5. Whether the errors made during the trial and/or the conduct of the trial were so highly prejudicial to petitioner's rights as to warrant a new trial.

Statutes Involved

The pertinent provisions of the Suits in Admiralty Act, 46 U. S. C. §§ 741, 742 and of the Act of Congress, known as the Merchant Marine Act, approved June 5, 1920, 46 U. S. C. § 688 are set forth in the Appendix.

Statement

THE PARTIES: The petitioner is a steamship company which operated the S/S "Uruguay" and other luxury liners which had been reconditioned by the United States Maritime Commission and placed in operation by the United States Government to ply between the port of New York and ports in South America. The Appellate Court treated the S/S "Uruguay" as a government owned vessel (R. p. 284). The respondent was a member of the crew (assistant Engineer) of the S/S "Uruguay" from September, 1938 to April, 1940 when he became very ill with rheumatic fever, necessitating his removal from the vessel by the petitioner at Rio De Janeiro (R. pp. 22, 229). He was 53 years of age and had been going to sea for approximately 27 years (R. pp. 20, 21, 131, 132).

The respondent ostensibly avoided a trial in Admiralty by suing the petitioner in the common law side of the United States District Court for the Southern District of New York where he had a jury trial.

Two causes of action were pleaded, the first charging negligence, the second seeking maintenance and cure (R. pp. 3, 4, 5, 6).

The answer denied the allegation of negligence but admitted an allegation that the petitioner chartered or leased the vessel from United States of America (R. pp. 6, 7, 8).

The complaint alleged that the respondent, during the course of his employment as assistant engineer on the vessel, received personal injuries due to the fault or neglect of the petitioner in that a grating in the fire room was left open without proper safeguards and with insufficient lighting at the particular time and place (R. pp. 4, 5).

The respondent had difficulty in deciding as to the date of his accident and in fixing the date of his accident (R. pp. 62, 63, 64, 65, 232, 252 to 256). The complaint gave no date. By his bill of particulars, the time was fixed as October, 1939 (R. p. 13). He testified in his examination before trial that the date of the accident was October, 1939 (R. p. 63). Respondent was unable to give the date of his accident while testifying at his trial (R. pp. 64, 87, 251). At the time of the trial, respondent was still suffering from the effects of the rheumatic fever and rheumatic arthritis which he had when he was carried off the vessel in April, 1940 (R. pp. 130, 131, 132). The Jury's award in the negligence case was $9,000. The verdict on the maintenance and cure count was "no award" (R. p. 266).

Respondent was a superior officer on duty and in charge of the fire room when the vessel was at Santos, Brazil, in

June, 1939 (R. pp. 24, 25, 49). He testified that he fell into an opening in the floor 3 feet deep where a grating had been raised (R. pp. 27, 75). He stated that, although he was carrying a flashlight he could not see because the light which illuminated that part of the after fire room where he was walking was not shining (R. pp. 27, 46, 47, 48).

Since the only person to whom respondent allegedly reported the accident was dead at the time of the trial, petitioner's proof was necessarily circumscribed (R. p. 223). Witnesses did, however, testify that regular inspections of the lights were made to see that they were properly functioning (R. pp. 70, 71, 75, 76, 102). There was proof that such inspection was made at the beginning of the watch (R. p. 102). Respondent corroborated this proof by admitting the inspections (R. pp. 70, 71, 75, 76). There was no evidence that petitioner had any knowledge that the light which was shining at the start of the watch, no longer continued to shine.[1] Nor was there any evidence as to how long the light was out so as to impute constructive knowledge.[2] Similarly, there was no evidence offered to show that petitioner had any knowledge (active or constructive) of the opening. There was no proof as to who removed the grate or how long the hole remained uncovered.[3].

The appeal which the petitioner took to the United States Circuit Court of Appeals for the Second Circuit was argued October 19, 1942. The decision affirming the judgment in favor of respondent was rendered December 7, 1942.

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[1] Respondent and his witnesses, the only two persons present in that part of the ship (fol. 266), both stated they did not know when the light went out or how long it remained out (fol. 77).

[2] Constructive notice would manifestly be insufficient in view of the declaration of the bill of particulars (paragraph 8e), charging petitioner with actual knowledge. This bill, served pursuant to order of the District Court, charged the petitioner with having actual knowledge of the alleged condition.

[3] Respondent declared he did not know who removed the grate or when it was removed (fols. 74, 75, 210).

Reasons for Granting the Writ

1. The questions presented in the instant case are of the utmost public importance.

Today, because of the world-wide struggle in which our country is involved, merchant shipping is perhaps our most essential need. Toward this end, any private litigation that needlessly interferes with the free movement of such shipping is of vital public concern, transcending any benefits or injury to the private litigants. Heretofore, there has been no decision of this or any other Court, settling, with finality, the question whether the Suits in Admiralty Act, 46 U.S.C. §§ 741, 742, provides the exclusive remedy for injuries resulting from the operation of merchant shipping owned by the United States and leased by it for operation to a private corporation. This Court has already ruled on certain problems arising under the Act, *i. e.*, its applicability to those instances wherein the United States, its wholly owned corporations or certain private operating companies operated the vessels. (*Johnson* v. *Fleet Corp.*, 280 U. S. 320; *Fleet Corp.* v. *Rosenberg Bros.*, 276 U. S. 202.) In each instance it ruled that the Act provides the exclusive remedy. Recently this Court granted *certiorari* in the case of *Brady* v. *Roosevelt S.S. Co. Inc.*, argument thereon having been heard December 18, 1942. The Court below, by ruling herein that the Act does not apply when the ship is leased by the United States to a private corporation for operation has permitted seamen to file a libel *in rem* in the Admiralty Courts and accordingly to seize the ship. Whether the statute is to be thus circumscribed is a question of vital public interest, not only to the many operators of merchant shipping; to the thousands of seamen and other possible claimants; but to the entire public and the country at large. It is

submitted that public interest will be promoted by the settlement in this Court of the questions involved.

2. The further issue of whether the Act is limited to such instances wherein the United States would be liable for any recovery sustained is for the same reasons of vital public interest.

3. The decision of the Circuit Court that the Act is not applicable to cases wherein the United States has leased the vessel to a private concern for operation is not in harmony with the principles laid down by Congress; by the decisions of this Court in the *Rosenberg* and *Johnson* cases, *supra;* the decision of the same Circuit Court in the *Brady* case 128 Fed. (2d) 169, 170, and with the decision of the New York Court of Appeals in the case of *Shea* v. *Export S.S. Corp.,* 253 N. Y. 17. Similarly the ruling that the responsibility of the government for the damages is the governing criterion, is in direct contradiction to the previous ruling of the Court below in the *Brady* case, *supra.*

4. A further issue of public importance is the Circuit Court's ruling that a ship operator is guilty of negligence *ipso facto* for the failure to keep a light shining, where there is no evidence to indicate it knew the light no longer burned. The case presents a problem quite apart from the usual question of whether the defendant, having cause to believe a dangerous situation exists, does not rectify it. The question is, does the mere existence of the situation unbeknownst to the operator create negligence. Such problem is of general interest in view of the ever growing scope of our merchant marine, and should be adjudicated with finality. The above issue is in apparent conflict with the previous rulings of this Court in *Engle* v. *Davenport,* 271 U. S. 33 and *Lingren* v. *U. S.,* 281 U. S. 38. It is also apparently

in conflict with the case of *Bryant* v. *Vestland*, 52 Fed. (2d) 1078, 1079 (C. C. A. 5).

5. Because the Court below has apparently departed from the settled rules of law which apply in such a case, and because of the conflict between the decision in the instant case, other decisions of the Court below, and decisions of other Circuit Courts, the law has now become confused. It is submitted that the new standard of care sought to be imposed by the Circuit Court should be reviewed and finally settled by this Court.

In conclusion, it is respectfully urged that there is here presented problems of law which vitally affect public interest. These issues do not concern questions of fact, but rather (1) the interpretation of a statute of the United States, and (2) a standard of care owing by the operator of a vessel to a member of the crew of the vessel.

WHEREFORE, your petitioner, referring to the annexed brief in support of the foregoing reasons for review, respectfully prays that this Honorable Court issue a writ of certiorari directing the United States Circuit Court of Appeals for the Second Circuit to certify and send to this Court full and complete transcripts of the records herein to the end that the said cause may be reviewed and determined by this Court as provided by law, and that the judgment of the Circuit Court of Appeals for the Second Circuit may be reviewed and that your petitioner may have such other, further and different relief as to this Honorable Court may seem just.

Dated, New York, December 31, 1942.

MOORE-MCCORMACK LINES, INC.,
Petitioner.

By: CORYDON B. DUNHAM,
Counsel for Petitioner.